

D.T.E. 98-78/83

Petition of Cambridge Electric Light Company, Commonwealth Electric Company, and Canal Electric Company for Approval of Asset Divestiture.

Petition of Eastern Edison Company and Montaup Electric Company for Approval of a Sale by Montaup of its interest in the Canal 2 generating facility to Southern New England, L.L.C.

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INTERLOCUTORY ORDER DENYING HARVARD COLLEGE'S APPEAL OF THE
HEARING OFFICER'S RULING ON MOTION TO FILE LATE PETITION TO
INTERVENE AND PETITION TO INTERVENE

I. INTRODUCTION

A. Procedural History

On July 31, 1998, Cambridge Electric Light Company ("Cambridge"), Commonwealth Electric Company ("Commonwealth"), and Canal Electric Company ("Canal") (together, "COM/Elec") filed a petition with the Department of Telecommunications and Energy ("Department") for approval of the sale of substantially all of their non-nuclear generating assets. The matter was docketed as D.T.E. 98-78. On August 7, 1998, Eastern Edison Company ("EECo") and Montaup Electric Company ("Montaup") filed a petition for approval of a sale by Montaup of its interest in the Canal 2 generating facility to Southern New England, L.L.C.¹ The matter was docketed as D.T.E. 98-83. Subsequently, the two proceedings were consolidated.

Pursuant to notice duly published,² the deadline for intervention in both proceedings was set for August 20, 1998. The following timely petitions to intervene were received: the

¹ Canal and Montaup are both 50 percent owners in the Canal 2 generating facility.

² COM/Elec published notice in the Boston Globe, the Cambridge Chronicle, and the New Bedford Standard Times on August 13 and in the Cape Cod Times on August 14, 1998, in accordance with the terms of the Department's Amended Order of Notice, issued on August 11, 1998. In addition, COM/Elec served a copy of the notice by mail to the service lists for D.P.U. 96-100 and D.P.U./D.T.E. 97-111, the Chairmen of the Boards of Selectmen, the Mayors and City Clerks in every city and town within the service territories. COM/Elec made satisfactory return of service to the hearing officer on August 20, 1998.

Division of Energy Resources ("DOER"); Southern Energy New England, Southern Energy Canal and Southern Energy Kendall, L.L.C. ("Southern Parties"); Boston Edison Company ("BECo"); Western Massachusetts Company ("WMECo"); Cape Light Compact and Constituent Municipalities ("Cape Light Compact"); and the Massachusetts Institute of Technology ("MIT"). The Attorney General of the Commonwealth ("Attorney General") filed a notice of intervention as of right, pursuant to G.L. c. 12, § 11E.

At the procedural conference held on August 21, 1998, DOER, Cape Light Compact and the Southern Parties were granted full intervenor status; BECo and WMECo were granted limited participant status.³

On September 1, 1998, the President and Fellows of Harvard College ("Harvard") filed a Motion to File Late Petition to Intervene ("Motion") and Petition to Intervene ("Petition"). On September 3, 1998, COM/Elec filed its opposition to Harvard's Motion and Petition ("Opposition").

B. Hearing Officer Ruling

In its Motion, Harvard argued that it has a substantial and specific interest in the outcome of two issues involved in this proceeding: (1) Harvard has a right of first offer for the Blackstone unit (a COM/Elec plant on Memorial Drive in Cambridge), and only discovered that its interest in Blackstone might be an issue in this proceeding when it reviewed

³ MIT was subsequently allowed to intervene. Cambridge Electric Light Company/Commonwealth Electric Company/Canal Electric Company/Eastern Edison Company/Montaup Electric Company, D.T.E. 98-78/83 (Hearing Officer Ruling at 8 (September 10, 1998)).

the Department's information requests;⁴ and (2) the filing includes a proposal for the allocation of the proceeds from the sale of the Canal power plant that Harvard claims fails to account properly for the interests of Cambridge ratepayers, particularly Harvard (Motion at 2). Harvard explained that it "belatedly discovered" COM/Elec's allocation proposal was not consistent with its interests (id.).

In its Opposition, COM/Elec argued that Harvard's Motion should be denied because it failed to show good cause for the late filing (Opposition at 1). First, COM/Elec noted that Harvard does not claim that notice of this proceeding was deficient. Id. at 2. COM/Elec contended that Harvard was provided with a copy of its divestiture petition upon filing with the Department on July 31, 1998. Id. at 3. Moreover, COM/Elec asserted that it met with Harvard to discuss the plans with respect to the status of the Blackstone plant. Id. COM/Elec stated that its prefiled testimony makes clear, however, that it does not seek adjudication of any Blackstone issues until Blackstone mitigation efforts are concluded. Id. at 5 (citing Exh. RDW-1, at 12). Regarding the allocation proposal, COM/Elec contended that Harvard has provided no explanation whatsoever for having only recently discovered the issue. Id. at 3-4. Further, COM/Elec pointed out that the issue was prominently identified in the divestiture petition filing. Id. at 4.

On September 10, 1998, the hearing officer issued a ruling denying Harvard's Motion.

Cambridge Electric Light Company/Commonwealth Electric Company/Canal Electric

⁴ On August 25, 1998, the Department had issued its first set of information requests to COM/Elec concerning its petition. Information requests DTE/COM-1-12, 13 and 14 concerned the Blackstone unit.

Company/Eastern Edison Company/Montaup Electric Company, D.T.E. 98-78/83 (Hearing Officer Ruling at 8 (September 10, 1998)) ("Hearing Officer Ruling"). With regard to Harvard's first argument, about the Blackstone unit, the hearing officer determined that "the Department's information requests were indeed only intended to obtain background information" (Hearing Officer Ruling at 8). Regarding Harvard's second argument, the Hearing Officer Ruling noted that "Harvard offers no explanation for filing late with regard to the allocation proposal" (*id.*). As a result, the hearing officer ruled that Harvard failed to show good cause and the Motion to File Late was denied. Pursuant to 220 C.M.R. § 1.06(6)(d)3, Harvard appealed the ruling on September 14, 1998 ("Appeal").

II. POSITIONS OF THE PARTIES

In its Appeal, Harvard argues that it demonstrated "good cause" and therefore Harvard's Petition and Motion should have been granted (Appeal at 3). With respect to the Blackstone unit, Harvard reiterates the argument it raised in its Motion, that is, the reason for the late filing was that it did not previously believe that its interest in the plant was at issue in this proceeding until after reviewing information requests concerning the Blackstone unit issued by the Department after the deadline for intervention (Appeal at 4-5). With respect to the issue of allocation of proceeds, Harvard explains that its "belated discovery [of the allocation proceeds] was caused by placement of critical information in separate sections of the filing" (Appeal at 6). Harvard also argues that its late intervention will not prejudice the Department or the parties in the efficient conduct of the proceeding. *Id.* at 4. COM/Elec

states that it opposes Harvard's Appeal, resting on the arguments it presented in its Opposition (Tr. 1, at 9).

III. STANDARD OF REVIEW

The Department's regulations require that a petition to intervene describe how the petitioner is substantially and specifically affected by a proceeding. 220 C.M.R. § 1.03(1)(b); see also G.L. c. 30A, § 10. In interpreting this standard, the Department has broad discretion in determining whether to allow participation, and the extent of participation, in Department proceedings. Attorney General v. Department of Public Utilities, 390 Mass. 208, 216 (1983); Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 45 (1978) (with regard to intervenors, the Department has broad but not unlimited discretion), cert. denied, 439 U.S. 921 (1978); see also Robinson v. Department of Public Utilities, 835 F. 2d 19 (1st Cir. 1987). The Department may allow persons not substantially and specifically affected to participate in proceedings for limited purposes. G.L. c. 30A, § 10; 220 C.M.R. § 1.03(1)(e); Boston Edison, 375 Mass. at 45. A petitioner must demonstrate a sufficient interest in a proceeding before the Department will exercise its discretion and grant limited participation. Id. The Department is not required to allow all petitioners seeking intervenor status to participate in proceedings. Id.

The deadline for filing a motion to intervene or to participate in a Department proceeding is set out in the Order of Notice, which provides a brief description of the procedure and prescribes the time, manner, and frequency of publication of notice to the general public or to any specific class of persons designated by statute or by Department rule.

Given legally sufficient notice (see Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("An elemental . . . requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action. . . ."), potentially interested persons may reasonably be presumed to be aware of and to respond to such notice. In the interest of fairness, Department rules provide for failure to file petitions to intervene in a noticed proceeding, but require a showing of good cause for lateness to be excused or waived.

In ruling on late-filed petitions to intervene or otherwise participate in its proceedings, the Department takes into account a number of requirements and factors in its analysis. First, as noted, the Department considers whether a petitioner has demonstrated good cause for late-filing. See 220 C.M.R. § 1.01(4). While "good cause" may not be readily susceptible of precise definition, the proponent of a waiver must make a convincing showing of good cause in the first instance to the hearing officer acting under G.L. c. 25, § 4, and may not reserve such a showing for a later appeal of the Hearing Officer's ruling to the Commission. See Bay State Gas Company, D.P.U. 95-52, at 2, Interlocutory Order (July 21, 1995). Administrative efficiency requires that a proponent of a waiver state all available grounds at the time the ruling is requested. If the Department finds that there is good cause and that the petitioner is substantially and specifically affected, then the Department balances the extent of participation against the need to conduct a proceeding in a complete, efficient, and orderly fashion.⁵

⁵ When balancing these factors, the Department has considered (1) the extent of the delay, (2) the effect of the late participation on the ongoing proceeding, and (3) the
(continued...)

IV. ANALYSIS & FINDINGS

The hearing officer was correct in finding that Harvard failed to show good cause for its late filing. The published legal notice in this proceeding was reasonably calculated and sufficient to call to the attention of any person, potentially interested in the matter, the nature of the proceeding and its threshold procedural requirements. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314. As required by the Department's Order of Notice, COM/Elec delivered a copy of the notice to designated municipal officials in COM/Elec's service territory. Also as required, COM/Elec published notice on August 13 and 14, 1998, in several newspapers available to Harvard, including the Boston Globe and the Cambridge Chronicle. The notice as published adequately described the purposes of the proceeding and specifically called to the attention of the reader the terms under which intervention might be sought, citing 220 C.M.R. § 1.03 and G.L. c. 30A, §10. More than this, a public notice in a proceeding of this kind cannot, and need not, do. Others similarly situated (such as MIT) heeded the notice and acted upon it. While there may occasionally be good cause for failure to respond to a public notice, good cause must be shown through adequate pleading of circumstances and reasons. Harvard has made no such showing. Indeed, its claim of "belated discovery" that features of the filing interested Harvard is tantamount to admitting that it knew of the proceeding but failed to follow up on its right to petition to intervene.

(...continued)

explanation for the tardiness. Western Massachusetts Electric Company, D.P.U. 92-8C-A at 5 (1993); NYNEX, D.P.U. 94-50, at 3 (1994).

Harvard raises certain arguments that are, strictly speaking, logically irrelevant to the question of good cause shown for lateness, but we deal with these arguments even so.

Harvard argues that its late filing is justified because the "Department's apparent interest in the Blackstone unit arose after the intervention deadline had passed" (Appeal at 5). As the hearing officer noted, however, the Department's information requests were strictly for the purpose of obtaining background information (Hearing Officer Ruling at 8). Indeed, the responses to these information requests were not moved into evidence in the proceeding (Tr. 3, at 510). Moreover, Harvard does not dispute that COM/Elec provided Harvard with a copy of its divestiture petition upon filing with the Department on July 31, 1998, that COM/Elec met with Harvard to discuss plans with respect to Blackstone, and that COM/Elec advised Harvard that there might be questions asked about Blackstone's status. In addition, COM/Elec's prefiled testimony makes clear that COM/Elec does not seek adjudication of any Blackstone issues until Blackstone mitigation efforts are concluded (Exh. RDW-1, at 12). In light of such, Harvard has failed to demonstrate good cause for failing to file a timely Petition with regard to the Blackstone issue.

With regard to the allocation proposal, Harvard explains it only "belatedly discovered" that the allocation proposal was inconsistent with its interests because the critical pieces of information appeared in separate sections of COM/Elec's filing (Motion at 2; Appeal at 6-7). The Department does not accept Harvard's claim that the organization of the petitioner's filing was the reason for its belated discovery of the allocation proposal and, thus, the reason for its late-filed petition to intervene. As noted above, MIT was able to discern the import of the

Companies' proposal within the allotted time period, and MIT and Harvard received evidently identical copies of the filing. No legal notice can recite an entire petition and supporting documentation. It is enough when a notice adequately describes the proceeding, lets a person know how to enquire about it further, and informs the world at large of the terms for intervention.

Thus, with no acceptable reason given in Harvard's Motion, the hearing officer was correct in finding a failure to show good cause. See Investigation of Recovery of Gas Transition Costs, D.P.U. 94-104-B, at 6-8 (1995). As such, there is no need to address Harvard's argument that its late filing causes no prejudice. Therefore, its Appeal is denied.

ORDERED: The Appeal from the Denial of Motion To File Late The Petition To Intervene Of President And Fellows Of Harvard College is denied.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner